

SENATE ENVIRONMENT COMMITTEE

HEARING ON:

A LONG TERM APPROACH TO ADDRESSING THE ASIAN CARP IN ILLINOIS WATERWAYS

January 21, 2010

Testimony of Henry L. Henderson
Director of the Midwest Program
Natural Resources Defense Council

Thank you for the opportunity to present testimony on this urgent crisis. My name is Henry Henderson, and I am the Director of the Midwest Program of the Natural Resources Defense Council. NRDC is a national environmental action group, combining the grassroots power of 1.3 million members and online activists with the courtroom clout and expertise of more than 350 lawyers, scientists and other professionals. The future of the Great Lakes, 20% of the world's fresh water, is a priority for our many members and our mission to protect the resources and systems upon which all life depends. Accordingly, I am pleased to be included in this important hearing on the future of our ecosystem.

Ladies and gentlemen, we have a problem.

We need to approach it properly: how we do so goes to the heart of who we are as a people, and what Illinois is as a state, and how Chicago achieves its goal to become, as Mayor Daley has repeatedly pledged, the Greenest City in America.

Asian carp threaten billions of dollars in the regional tourism and fishing industries. And more importantly, they threaten the drinking water of 40 million people and the quality of life that we enjoy in the Great Lakes region. But the invasive fish also represent a very different alarm bell that we cannot ignore. The very channel that the carp are using to swim towards Lake Michigan represents both a massive threat to our regional economy and incredible opportunity.

The Metropolitan Water Reclamation's own Supreme Court brief shows the dangers that relying on the 19th Century technology employed in our water system. The document and their public statements point out that the locks that safeguard our city have only been opened 10 times in the more than a century that the system has been in place---but 5 of those openings have occurred in the last 16 months. As the City's Climate Action Plan points out, we can expect increasing violent rain activity in the coming decades which could cause the system to reach a breaking point, and at minimum force MWRD to push untreated sewer water out into Lake Michigan, the source of our drinking water, on a much more regular basis. This is unacceptable. We must address our infrastructure and ecological needs now.

We have an opportunity to meet the threat, fix the problems and make the first truly significant progress in renewing and restoring the Great Lakes by rebuilding Chicago's transportation and water management system to set the standard for the 21st Century. It is the most propitious time to make this effort---there is a Great Lakes-basin wide consensus that the ecosystem need to be restored. There is unprecedented commitment of resources to do this; and there is consensus among all of the Great Lakes community, in this country and in Canada, that the developments in the Chicago water way present an immediate and lingering threat to the very future of the Great Lakes----That exception is Illinois...which officially is out of step and seems to feel neither the urgency of the challenge or the inclination to seize the opportunity before us

to fix the problem and fundamentally improve our water and transportation policies, practices and infrastructure. It is an issue made quite clear in the language of the Great Lakes Compact and in the State of Michigan's Supreme Court case, no matter what its outcome.

The General Assembly can help redress this situation and make Illinois the leader in this controversy and continue the important progress towards a renewed, vibrant Great Lakes community.

That leadership requires several things:

- Recognition of the real, crucial nature of the challenge presented by the Chicago waterway as a highway for invasive species.
- Recognition of the State's ethical responsibility to protect and improve the water way and the State's relationship to the Great Lakes.
- Recognition of the HUGE opportunity we have before us to get the job done.
- Summoning the will to seize the opportunity.
- Forcing a federal response that mirrors the urgency of the threat

1. The Problem.

The threat is clear. The Chicago Waterways, built and enjoyed by the State of Illinois and its sub units of government, present an unambiguous threat to the health, safety and economy of the 20% of the world's fresh water---the largest fresh water body in the Western Hemisphere. Asian carp filter feeding has the potential to not only destroy an already weakened Great Lakes fishery, but to turbo-charge ecosystem changes already initiated by invasive zebra and quagga mussels which threatens to make the bottom of Lake Michigan an environment more friendly to dangerous human pathogens. Worse, the silver and bighead carp do not represent the end of the threat. Other invasive species are queued up to follow, including the even more dangerous black carp. Until the connection between the Mississippi River system and Great Lakes basin is addressed we are simply asking for continued transfer of invasive species that will threaten both ecosystems.

2. The Duty of the State of Illinois

That body of water is owned by the people, and the State of Illinois is a Trustee for the people's interest---the state has an ethical duty to protect the public trust in the water, fisheries, health, safety property and economic well being of the Lakes. Indeed, the central statement of this Trust/Trustee relationship that is central to the State's function, duty and nature involved in this matter, is the 1892 Supreme Court case Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892) that concerned Lake Michigan, and the harbor of Chicago. That case had to do with an early action by the Illinois General Assembly to essentially privatize a part of Lake Michigan by granting it to the Illinois Central Railroad to promote commerce in Illinois. The Supreme Court held that the common law Public Trust Doctrine prevented the government from alienating (i.e., privatizing) Lake Michigan lands and impairing the public's interest in the Lake, and access to Lakes. Interestingly, the judgment explicitly noted the importance of the public's interest in the continued ability to fish in the Lake. The Court recognized that the relationship is a trust relationship: the state stands as the Trustee, duty bound to protect the public's interest in the Lakes. The concept also has been found to apply to the natural resources (mineral or animal) contained in the soil and water of public trust assets.

I would also point Legislators and officials to review: Sax, Joseph L. (1970). "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention". *Michigan Law Review* 68 (3): 471-566es under a public-trust doctrine.

So: in approaching this issue, the integrity of the state of Illinois and its ethical duty to protect the health, safety and well being of the Lake and the waters of Illinois is at the heart of the matter. This is peculiarly lost in much if the recent positions taken by Illinois officials, who seem most concerned about unrestricted use of Illinois' water ways by selected private haulers, rather than the broad public interest in safe, healthy water and a vibrant fishery worth \$7 billion annually to the Great Lakes community (not to mention potential impacts to the far larger tourism industry of Chicago and broader region). True, there are questions as to impacts of immediate and temporary actions such as closing the locks, but the State, federal, and regional regulators and authorities have simply not shown leadership in laying out alternatives or taking precautionary action at a time when the status quo has been shown to have potentially devastating consequences.

In 2007, Illinois officials reacted with great speed on behalf of the Great Lakes when the State of Indiana granted a sub-par permit to British Petroleum to increase pollution to Lake Michigan. At the time, the entire political establishment of Illinois rose up in righteous indignation to smite back the proposed pollution of the Lake. In the face of a potentially larger threat, we need to summon that sensibility in this case of "living pollution" that is moving daily toward and now into Lake Michigan through the Chicago waterway system.

It is highly ironic that the Chicago waterway system was constructed by Illinois and Chicago to keep pollution out of the Lake---and is now the highway for a devastating living pollution that can irreparably harm the Great Lakes. In a previous generation, this community looked at the facts, assessed the ongoing threat and toll of pollution, and undertook heroic efforts to fix the problem by reversing the flow of a river. We need to recover that sense of heroic possibility in the face of the real threats before us----and fix this problem.

3. What Must be Done

In the short-term, we must proactively attack this problem to prevent the fish from establishing themselves in the waterways of the Chicago Diversion and in Calumet Harbor where testing shows that the fish may have already reached Lake Michigan. As the Army Corps of Engineers tests are clearly showing, Asian carp DNA is being found in more and more dispersed Chicago waterways. The longer we dither, the greater the threat. Most of the Great Lakes advocacy NGOs believe that a short-term, temporary closure of the locks would slow the carp's advance and allow for an aggressive eradication effort to ensure the elimination of the invasive fish. While the federal authorities have promised to step up testing, press reports in Indiana today note that hundreds of eDNA tests have not been processed and waterways such as the Grand and Little Calumet Rivers have not been re-tested to evaluate the problem, even after indications of the carp's presence in Calumet Harbor. The State of Illinois must ensure that appropriate resources and urgency are brought to the table.

The more important work and opportunities for this region come from the long-term solution to the problem. Invasive species will not stop threatening until the two ecosystems are separated.

The Great Lakes NGO community has been calling repeatedly for a better airing of the issues in the form of a public, transparent, comprehensive analysis of how best to deal permanently with the problems presented by the canal and the threats illuminated by this carp saga. The effort, particularly from the federal regulators has been anything but open and efficient, as witnessed

by the troubling history of the electric carp barrier which suffered an embarrassing array of budget and scheduling issues, and now seems to have failed in its basic mission of stopping the carp.

That plan must consider the needs of the public, the environment, and commercial interests. And those interests make clear that the limited response that we have seen up to this point will not suffice. Any durable, long-term solution will require enlightened leadership to create a plan for a modern, more sustainable transportation and water management infrastructure for Chicagoland.

Unfortunately, delays in addressing this slow-motion tragedy have forced us into emergency mode. The robust process required to respond to this crisis cannot wait until 2014, as indicated by the Corps. The State of Illinois and other Great Lakes states must force a more responsible timeline. As we have seen from the eDNA testing, the carp keep swimming. The delay has forced us into a position that will have impact on our time and treasury. An appropriate response to the crisis will likely carry a price tag that is not ideal in tough economic times, but an inappropriate response will be far more costly in the not-too-distant future.

The good news is that this also presents an incredible opportunity in the longer term. Just as in the last turn-of-the-century when the canals were put in place, we find ourselves at another point where the status quo is untenable. The Asian carp are a clear sign that we need to re-establish natural barriers between the Mississippi and Great Lakes to safeguard one-fifth of the world's fresh water and the region's most precious asset. But this crisis is also a clarion call to tackle the infrastructure problems that have grown more and more vexing in recent decades as we have remained reliant on century-old structures.

Michigan's request has also been strongly supported by federal and state lawmakers and opinion leaders. A bipartisan group of over 50 members of the Great Lakes delegation in Congress signed a letter supporting Michigan's lawsuit. In both Michigan and Wisconsin, a Democratic governor has joined with a Republican attorney general to push for ecosystem separation, as have state legislators, mayors, and editorial boards across the Great Lakes.

Meanwhile, the Army Corps has indicated in response to the litigation that it has at last begun to undertake a feasibility study of "alternative options and technologies" for preventing Asian carp and other invasive species from crossing between the Great Lakes and Mississippi River ecosystems, which the agency was directed to perform by Congress in the Water Resources Development Act of 2007. The Army Corps will be preparing an EIS in connection with the feasibility study. Even at a time of budget uncertainty, the State of Illinois must begin lining up the resources to enact solutions outlined in the feasibility study from the federal government and other Great Lakes states.

Most importantly at present, Illinois needs to engage effectively and at a high level with Administration officials in Washington to ensure that this nascent federal effort, is given the appropriate attention and support to ensure that not only is it conducted with a sense of urgency, i.e., as quickly as possible, but also that it be conducted transparently and incorporate a wide range of public outreach and input.

If these steps are taken, we are confident that a durable, permanent, cost-effective solution to this crisis can be had in short order. It is a solution that will result in jobs and modern infrastructure for the region, a renewed unity amongst the Great Lakes states to protect what is

arguably the nation's most important natural resource, and the elimination of a massive threat to the regional economy.

